

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CLAUD M. THOMAS, JR.,)	No. C 10-04166 JF (PR)
)	
Plaintiff,)	ORDER OF SERVICE; DIRECTING
)	DEFENDANTS TO FILE DISPOSITIVE
vs.)	MOTION OR NOTICE REGARDING
)	SUCH MOTION; INSTRUCTIONS TO
)	CLERK
PRISON HEALTH SERVICES, et al.,)	
)	
Defendants.)	
_____)	

Plaintiff, an inmate currently incarcerated at the Santa Rita Jail in Dublin, California, filed the instant civil rights action in pro se pursuant to 42 U.S.C. § 1983 against jail officials for constitutionally deficient medical care. Plaintiff's motion for leave to proceed in forma pauperis will be granted in a separate written order.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify

any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

B. Plaintiff's Claims

Plaintiff alleges that Santa Rita Jail officials have failed to provide him with adequate medical care for his chronic medical condition, including back pains. (Comp. at 3.) Plaintiff alleges that he was told to stop turning in medical request forms as they would be thrown away. (Id. at Attach. 2.) Liberally construed, his claims are cognizable under § 1983 as violations of the Eighth Amendment by defendants' alleged deliberate indifference to serious medical needs. See Estelle v. Gamble, 429 U.S. 97, 104 (1976).

CONCLUSION

For the reasons stated above, the Court orders as follows:

1. The Clerk of the Court shall issue summons and the United States Marshal shall serve, without prepayment of fees, a copy of the complaint in this matter, all attachments thereto, and a copy of this order upon **Defendants Dr. Harold Orr, Mechell J. Verselles of Prison Health Services** at the **Santa Rita Jail**. The Clerk shall also mail courtesy copies of the Complaint and this order to the California Attorney General's Office.

2. No later than **sixty (60) days** from the date of this order, Defendants shall file a motion for summary judgment or other dispositive motion with respect to the claims in the complaint found to be cognizable above, or, within such time, notify the Court that

1 Defendants are of the opinion that this case cannot be resolved by such a motion.

2 a. If Defendants elect to file a motion to dismiss on the grounds that
3 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.
4 § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to
5 Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v.
6 Terhune, 540 U.S. 810 (2003).

7 b. Any motion for summary judgment shall be supported by adequate
8 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
9 Civil Procedure. **Defendants are advised that summary judgment cannot be granted,**
10 **nor qualified immunity found, if material facts are in dispute. If Defendants are of**
11 **the opinion that this case cannot be resolved by summary judgment, they shall so**
12 **inform the Court prior to the date the summary judgment motion is due.**

13 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court
14 and served on Defendants no later than **thirty (30) days** from the date Defendants'
15 motion is filed.

16 a. In the event Defendants file an unenumerated motion to dismiss
17 under Rule 12(b), Plaintiff is hereby cautioned as follows:¹

18 The Defendants have made a motion to dismiss pursuant to Rule
19 12(b) of the Federal Rules of Civil Procedure, on the ground you have not
20 exhausted your administrative remedies. The motion will, if granted, result
21 in the dismissal of your case. When a party you are suing makes a motion
22 to dismiss for failure to exhaust, and that motion is properly supported by
23 declarations (or other sworn testimony) and/or documents, you may not
24 simply rely on what your complaint says. Instead, you must set out specific
25 facts in declarations, depositions, answers to interrogatories, or documents,
26 that contradict the facts shown in the Defendant's declarations and
documents and show that you have in fact exhausted your claims. If you do
not submit your own evidence in opposition, the motion to dismiss, if
appropriate, may be granted and the case dismissed.

27 b. In the event Defendants file a motion for summary judgment, the

28 ¹ The following notice is adapted from the summary judgment notice to be given to pro
se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).
See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 Ninth Circuit has held that the following notice should be given to Plaintiff:

2 The defendants have made a motion for summary judgment by
 3 which they seek to have your case dismissed. A motion for summary
 judgment under Rule 56 of the Federal Rules of Civil Procedure will, if
 granted, end your case.

4 Rule 56 tells you what you must do in order to oppose a motion for
 summary judgment. Generally, summary judgment must be granted when
 5 there is no genuine issue of material fact--that is, if there is no real dispute
 about any fact that would affect the result of your case, the party who asked
 6 for summary judgment is entitled to judgment as a matter of law, which will
 end your case. When a party you are suing makes a motion for summary
 7 judgment that is properly supported by declarations (or other sworn
 testimony), you cannot simply rely on what your complaint says. Instead,
 8 you must set out specific facts in declarations, depositions, answers to
 interrogatories, or authenticated documents, as provided in Rule 56(e), that
 9 contradict the facts shown in the defendants' declarations and documents
 and show that there is a genuine issue of material fact for trial. If you do
 10 not submit your own evidence in opposition, summary judgment, if
 appropriate, may be entered against you. If summary judgment is granted
 11 in favor of defendants, your case will be dismissed and there will be no
 trial.

12 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).

13 Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and
 14 Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary judgment
 15 must come forward with evidence showing triable issues of material fact on every
 16 essential element of his claim). Plaintiff is cautioned that failure to file an opposition to
 17 Defendants' motion for summary judgment may be deemed to be a consent by Plaintiff to
 18 the granting of the motion, and granting of judgment against plaintiff without a trial. See
 19 Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18
 20 F.3d 651, 653 (9th Cir. 1994).

21 4. Defendants shall file a reply brief no later than **fifteen (15) days** after
 22 Plaintiff's opposition is filed.

23 5. The motion shall be deemed submitted as of the date the reply brief is due.
 24 No hearing will be held on the motion unless the Court so orders at a later date.

25 6. All communications by the Plaintiff with the Court must be served on
 26 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
 27 copy of the document to Defendants or Defendants' counsel.
 28

1 7. Discovery may be taken in accordance with the Federal Rules of Civil
2 Procedure. No further Court order is required before the parties may conduct discovery.

3 8. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
4 Court informed of any change of address and must comply with the Court's orders in a
5 timely fashion. Failure to do so may result in the dismissal of this action for failure to
6 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

7 IT IS SO ORDERED.

8 DATED: 2/22/11
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11 JEREMY FOGEL
12 United States District Judge
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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

CLAUD M. THOMAS, JR,
Plaintiff,

Case Number: CV10-04166 JF

CERTIFICATE OF SERVICE

v.

PRISON HEALTH SERVICES, et al.,
Defendants.

_____/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 2/23/11, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Claud M. Thomas AQI-083
Santa Rita Jail
5325 Broder Blvd
Dublin, CA 94568

Dated: 2/23/11

Richard W. Wieking, Clerk